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No. 331

IN THE

Supreme Court of the United States

OCTOBER TERM 1963

CECILE J. SHAPIRO,

Petitioner,

vs.

RUSSELL LEACH, BERNARD CHUPKA, SIDNEY GOLDEN, and TED HYSELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CECILE J. SHAPIRO,
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Attorney for Petitioner.

ALBA L. WHITESIDE,
City Hall, Columbus 15, Ohio,
Attorney for Respondents.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cecile J. Shapiro prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on the 28th day of April, 1964.

ORDERS BELOW

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court without opinion; reported at 330 F 2d 617, which order is printed in the appendix hereto, p. 16; the District Court had dismissed the petition as failing to state a cause of action, also without opinion, on July 8, 1963. The order of the District Court is printed as an appendix hereto, p. 15.

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1964. Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred upon this Court by the provisions of 28 U.S.C. Sec. 1254 (1).

STATEMENT OF THE QUESTIONS

1) May officials, acting under color of authority, cause any individual to be arrested on the affidavit of any mentally disturbed, vindictive, or irresponsible person, which affidavit was averred to before a notary public, contrary to requirements of state statute, and without inquiry as to probable cause, hold that person to answer to a charge on such affidavit?

2) Does the second amended petition filed in this cause state a cause of action on which relief can be granted?

The District Court failed to state the basis of its decision, but entered an order stating that it did not, therefore granted Branch 4 of the defendants' motion to dismiss the complaint.

The United States Court of Appeals for the Sixth Circuit affirmed without opinion. (330 F 2d 617)

STATUTES INVOLVED

This case involves United States Code, Title 42, Sections 1981, and 1983, which read as follows:

> Sec. 1981: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> Sec. 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected,

any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, or equity, or other proper proceedings for redress.

This case also involves the following statutes of the State of Ohio, which read:

Ohio Rev. Code: 2935.10: Who May Issue Warrant. Any judge, or clerk of Court, of any magistrate, may issue process for the arrest of a person charged with an offense returnable in the Court having jurisdiction thereof.

Ohio Rev. Code: 2935.11: Issuance of Warrant. When an affidavit charging a person with the commission of an offense is filed with a judge, clerk, or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused.

Ohio Rev. Code: 2935.19: Form of Affidavit. An affidavit in the form following is sufficient: The State of Ohio, ...County, SS:

Before me, A.B., Personally came C.D., who being duly sworn according to law, deposes and says that on or about the .... day of ...., at the county of ....., one E.F. (here describe the offense committed as nearly according to the nature thereof as the case will admit, in ordinary and concise language)

Sworn to and subscribed before me this ....day of ..... 19.....

A.B., Judge

This case also involves the Fifth and Fourteenth Amendments of the Constitution of the United States.

STATEMENT OF THE CASE

The plaintiff in this action was subjected to prosecution in the Municipal Court of Columbus, Ohio in 1959; when upon a scurrilous affidavit from a convict serving a third

conviction, which affidavit was averred to before a notary public was presented through the mail to the prosecutor of the City of Columbus (the defendant Bernard Chupka) and without trying to call in this plaintiff, and without even talking to the prosecuting witness, but only with the consent of the city attorney (the defendant Russell Leach), he did file the said affidavit with the Clerk of Courts (the defendant Ted Hysell) and did cause said Clerk of Courts to issue a warrant for plaintiff's arrest. Upon preliminary hearing, which was prosecuted by the defendant Sidney Golden, after the prosecuting witness testified, the complaint was dismissed for want of probable cause.

The plaintiff's position in this is: That she was subjected to false arrest and malicious prosecution by the acts of the defendants who were then acting in a position of authority for the local government; that they used their authority to subject her to such treatment and deprive her of her constitutional rights. The matter received widespread publicity on the front pages of newspapers, not only locally, but over the wire services, causing this plaintiff great humiliation, embarrassment and disgrace; thus did cause her vast injury and damage.

That the acts of the defendants were wilful and malicious is alleged in the petition.

REASONS FOR GRANTING THE WRIT

Does the second amended petition filed in this cause state a cause of action on which relief can be granted?

The District Court failed to state the basis of its decision, but entered an order stating that it did not, therefore granted Branch 4 of the defendants' motion to dismiss the complaint.

This cause of action is brought under Title 42, Section 1983 of the United States Code, and is therefore an action

based on the Statutes of the United States, and is not dependent upon diversity of citizenship or any other basis for jurisdiction of the United States District Court.

The affidavit on which the warrant was issued was averred to before a notary public. The Statutes of the State of Ohio set forth the means for commencement of a criminal action in Revised Code 2935.10, 2935.11 and the form of the affidavit is given in Revised Code 2935.19.

It is a well accepted principle of law that criminal statutes must be strictly construed, and that when the legislature expresses one means or method of procedure, all others are excluded.

In *ex parte Bollman*, 2 L. Ed 554, it was stated that it is unquestionably true that the issuance of a criminal warrant is judicial in its nature. The sections of the Revised Code 2935 et seq. deals with these matters. Section 2935.11 says that when an affidavit is filed with the judge, clerk or magistrate, *if he has reasonable cause to believe that an offense has been committed*, he shall issue a warrant thereon. This paragraph does two things. 1) It sets forth who shall take the affidavit, and therefore eliminates others from so doing. 2) It sets forth that only if he has reasonable cause to believe that the offense has been committed, shall he issue a warrant; thereby affirming the judicial nature of the issuance of such warrant. (Italics supplied.)

There is a paucity of cases which deal with the matter of affidavit on which arrest may be made in the State of Ohio. But one, that is the case of *Williams and Heraman v. Baitz*, 8 O.D. 695, the Franklin County Court of Common Pleas held that the affidavit for arrest of a debtor before judgment for arrest of a debtor before judgment under Secs. 5481 et seq., Rev. Stat. on the ground that the debtor contracted the debt with intent to defraud or is about to leave the state, sworn to before a notary is insufficient. It

must be sworn to before a judge, or clerk of court, or justice of the peace.

In the case of *Cox v. Perkins*, 151 Ga 632, the court referred to the Penal Code of Georgia for the question of validity of a warrant, and not to the general powers of notaries to take averments. The same is true in the case of *Application of Burton N. Pugach for Writ of Mandamus v. Milton Klein, warden of Knox County*, 193 Fed. Sup. 630.

The defendants also seem to rely on decisions of the State of Ohio, which hold that a prosecutor is not liable for his actions in pursuance of his duties, even though he acts maliciously. This position cannot be maintained.

In the case of *Stift v. Lynch*, 267 F 2d 237, an action to recover damages under Section 1981 et seq. of Title 42, it was held that Illinois law was not controlling on question of whether an Illinois justice of the peace was immune from civil liability for acts in the performance of his duties.

Further, in the case of *Nelson v. Knox*, 256 F 2d 312, it was held:

> Municipal officers' insulation from liability under the Civil Rights Act cannot be properly determined by reference to local rule of state in which municipality is located, since each state cannot be left to decide for itself which of its officials are completely immune from liability for depriving a citizen of rights granted by the Federal Constitution, but the matter must be decided as a matter of general law.

And in the case of *Niemotko v. Maryland*, 340 U.S. 268, the court held:

> The right to equal protection of the laws . . . by the First and Fourteenth Amendments has a firmer foundation than the whims or personal opinions of a local governing body.

CONCLUSION

The second amended petition, being within the class of actions on which relief may be sought under Title 42, Sections 1981 et seq., states a cause of action under which relief may be granted, and the cause should be remanded to the District Court for trial.

Respectfully submitted,

CECILE J. SHAPIRO
29 Olentangy Street, Columbus, Ohio,
Attorney for Appellant.

APPENDIX A

TRANSCRIPT OF DOCKET

1960, September 14. Complaint filed. Summons, copies complaint to MSDO.

1960, September 15. Amended Complaint filed. Copies to MSDO for service.

1960, September 28. Summons ret. ex. filed. Fee $8.20.

1960, October 11. Defdts. Application for Enlargement of Time filed.

1960, October 11. Order—Defdts. granted leave to plead by October 28, 1960 filed.

1960, October 28. Defendant's motion to dismiss complaint—memo. in support and proof of service, filed.

1960, November 16. Motion of the Plaintiff for an extension of time for oral argument on Defendant's motion to dismiss and for additional time in which to file briefs contra said motion to dismiss; filed.

1960, November 21. Order—30 day extension for filing of briefs filed.

1960, December 20. Pltfs. Memo Contra filed.

1961, January 12. Pltf's Supplemental Memo Contra filed.

1961, January 12. Letter from Plaintiff informing the Court that she wishes to waive oral argument, filed.

1961, January 13. Defendant's reply memorandum in support of motion to dismiss, filed.

1961, January 18. Pltfs. Additional Supplemental Memo Contra filed.

1961, April 4. Order—Defdts. Motion of October 28, 1960; Branches 6 and 7 Sustained; Branches 1, 2, 3, 4, and 5 should be held in abeyance until Pltf. has complied with the Order of the Court. Pltf. shall file an amended complaint within 15 days filed.

1961, April 28. 2nd Amended Complaint filed.

1961, May 23. Motion of the Deft's. to Dismiss and memo in support filed.

1963, July 8. Order—Branches 1, 2, 3, 4, 5, 6, 7 and 8 of defendant's motion to dismiss, Overruled, Branch 4, Granted and the cause is dismissed, filed. Copy to

1963, August 7. Notice of Appeal filed.

1963, August 7. Cash bond in the amount of $250.00 received for deposit into the Registry Account.

1963, August 8. Amount of $250.00 for Appeal Bond deposited into Registry Account.

1963, August 8. Record certified to U.S. Court of Appeals at Cincinnati, Ohio.

1964, April 28. Order of the U.S. Court of Appeals for the Sixth Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO — EASTERN DIVISION

CIVIL ACTION FILE NO. 5914

CECILE J. SHAPIRO,

Plaintiff

vs.

RUSSELL LEACH, BERNARD CHUPKA, SIDNEY GOLDEN, and TED HYSELL,

Defendants

SECOND AMENDED PETITION

The plaintiff is a native born citizen of the United States, residing in the State of Ohio, and is a duly qualified attorney-at-law in said State, having been admitted to practice therein in 1944; having been admitted to practice in this Court in 1945, and in the Supreme Court of the United States in 1948.

The defendants Russell Leach and Ted Hysell are now and were on the 15th day of September, 1959, duly elected officers of the municipality of Columbus, Ohio; the said Russell Leach as City Attorney and the said Ted Hysell as Clerk of Courts; and the defendants Bernard Chupka and Sidney Golden were on that date appointed officers of said municipality, being assistants to the aforesaid Russell Leach, Bernard Chupka still being in said position, while Sidney Golden having continued with that office for many months thereafter, but now being in private practice of law in Columbus, Ohio.

Plaintiff for her cause of action says that under the laws of the State of Ohio, criminal affidavits on which prosecution may be had or on which warrants for arrest are to be issued are to be averred before a justice of the peace, magistrate, judge, or before the clerk of the municipal court; that on or about the 15th day of September, 1959, the defendants did receive in their office from one Clarence Dye, an affidavit averred to by him before a Notary Public who was none of these; and did wilfully and maliciously cause the same to be filed and issued a warrant thereon without investigation; thus did cause the plaintiff to be arrested on September 20, 1959, and caused her to be held to answer in preliminary hearing without probable cause; and they did thereafter proceed to prosecute the plaintiff maliciously and without justification. Plaintiff says that the source of the said affidavit so received should have at least raised a presumption of unreliability, but that these defendants chose to ignore; all to the injury of this plaintiff, and in deprivation of her constitutional rights, since she was by these acts deprived of liberty without due process of law as secured to her by the Fifth and Fourteenth Amendments to the United States Constitution. This cause of action seeks redress for injury to plaintiff for deprivation of such rights as are guaranteed her as a citizen of the United States, and to recover damages for deprivation of such rights under color of state law, regulation, custom or usage, and says that these defendants and each and all of them did use the authority of their offices and positions with the City of Columbus, Ohio as a means of depriving her of her rights, privileges and immunities secured to her under the Fifth and Fourteenth Amendments of the United States Constitution.

Plaintiff says further that at the time complained of, the defendant Russell Leach was City Attorney for the City of

Columbus, Ohio; Bernard Chupka as assistant city attorney was acting as police prosecutor; and that defendant Sidney Golden was also an assistant in that department, being at that time assistant to Bernard Chupka; that as such they were under a duty by law and by custom and usage in such matters to investigate the complaint; and that the defendant as Clerk of Courts of the City of Columbus, Ohio at the time herein complained of, was under a duty by law to have the complainant appear before him or his deputy to aver his complaint and show reasonable ground to believe that an offense had been committed, or to see that the affidavit had been averred to before a judge, magistrate, or justice of the peace before issuing a warrant for arrest of the plaintiff, but none of these things were done and a warrant for plaintiff's arrest was issued; and as a result of the acts of the defendants, plaintiff was falsely arrested and maliciously prosecuted. The defendants violated their duties wilfully and maliciously and with wanton disregard for the plaintiff's rights under the United States Constitution and by their acts in depriving plaintiff of the rights, privileges, and immunities guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States, they did cause her vast injury and damage.

WHEREFORE: Plaintiff prays judgment against the defendants in the sum of One Million Dollars ($1,000,000.00).

CECILE J. SHAPIRO

STATE OF OHIO
FRANKLIN COUNTY, SS:

Cecile J. Shapiro, being first duly sworn, says that she is the plaintiff in the foregoing action; that she has read the foregoing petition, and that the facts and allegations contained therein are true.

CECILE J. SHAPIRO

Sworn to before me and subscribed in my presence this 28th day of April, 1961 at Columbus, Ohio.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

CIVIL ACTION FILE NO. 5914

CECILE J. SHAPIRO,

Plaintiff,

vs.

RUSSELL LEACH, et al.

Defendants.

MOTION TO DISMISS COMPLAINT

Now come the defendants and jointly and separately renew their motion heretofore made and move the Court as follows with regard to the second amended complaint:

1. To dismiss the action on the ground that the Court lacks jurisdiction inasmuch as the plaintiff and each of the defendants are residents of Franklin County, Ohio.
2. To dismiss the action on the ground that the Court lacks jurisdiction over the person of each of the defendants.
3. To dismiss the action on the ground that the Court lacks jurisdiction over the subject matter of the action.
4. To dismiss the action because the second amended complaint fails to state a claim against the defendants or any of them, upon which relief can be granted.
5. To dismiss the action because the second amended complaint does not set forth a statement upon which it is claimed the Court's jurisdiction depends.
6. In the alternative, should branches 1, 2, 3, 4, and 5 of this motion be overruled, to dismiss the action because the plaintiff in the second amended complaint has not

complied with the Court's order to make a more definite statement.

7. In the alternative, should branches 1, 2, 3, 4, 5, and 6 of this motion be overruled, to order the plaintiff to make a more definite statement in the complaint by setting forth a statement of the grounds upon which it is claimed that the Court's jurisdiction depends.

8. In the alternative, should branches 1, 2, 3, 4, 5, and 6 of this motion be overruled, to order the plaintiff to make a more definite statement of a claim which plaintiff claims entitles her to relief against the defendants.

ALBA L. WHITESIDE
Attorney for Defendants
City Hall, Columbus 15, Ohio

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

CIVIL ACTION FILE NO. 5914

CECILE J. SHAPIRO,

Plaintiff

vs.

RUSSELL LEACH, et al,

Defendants

ORDER

This cause came on to be considered upon the motion of all the defendants to dismiss in eight branches.

The Court having carefully considered the same and being fully advised in the premises, finds that as to branches 1, 2, 3, 5, 6, 7 and 8, said motion is not well taken and should be and it hereby is Overruled.

The Court further finds that the second amended complaint fails to state a claim against the defendants upon which relief can be granted. Therefore branch 4 of said motion is well taken and should be and it hereby is Granted and the cause herein is Dismissed.

s/ Underwood

Judge, United States District Court

Stamped:
John D. Lyter
Clerk, U.S. District Court
S.D.O.
Filed
Jul 8, 1963
A.M. P.M.
7 8 9 10 11 12 1 2 3 4 5 6

APPENDIX E

330 F 2d 617,

No. 15557

CECILE J. SHAPIRO,
Plaintiff-Appellant,

vs.

RUSSELL LEACH, BERNARD CHUPKA, SIDNEY GOLDEN, AND TED HYSELL,
Defendants-Appellees.

United States Court of Appeals
Sixth Circuit
April 28, 1964

Appeal from United States District Court, Mell G. Underwood, District Judge.

Cecile J. Shapiro, in proper., Columbus, Ohio (Harry W. Kyle, Xenia, Ohio, on the brief) for appellant.

Alba L. Whiteside, Columbus, Ohio, for appellees.

Before WEICK, Chief Judge, and CECIL and O'SULLIVAN, Circuit Judges.

ORDER

Upon consideration of the appeal, the Court finds that there is no error in the proceedings and judgment of the District Court.

It is, therefore, ordered that the judgment of the District Court be and hereby is affirmed.